Autonomy in Decline? A Commentary on Rimšēvičs and ECB v Latvia

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In the world of European central banking, the corruption case against Ilmars Rimšēvičs, Governor of the Central Bank of Latvia, is a major issue. Ordinary European lawyers like the present author could be excused for having missed the *Rimšēvičs* case pending before the EU Court of Justice (Cases C-202/18 and C-238/18). In its judgment of 26 February 2019, the Court of Justice for the first time had the opportunity to define the scope of the review conducted in an infringement proceeding pursuant to Article 14.2 of the Statute of the ESCB and of the ECB ('the Statute') and to determine the legal effect of a judgment rendered in this context. The latter gives the case a constitutional significance far beyond the field of central banking.

1. Background and Facts of the Case

In June 2018, Mr Rimšēvičs was charged by a Latvian public prosecutor with the offence of having received and accepted bribes for the benefit of a private Latvian bank, allegations which he denies. The criminal case is still pending. In the course of the investigation, the Latvian Anti-Corruption Office (the KNAB) had adopted several restrictive measures against Mr Rimšēvičs, including a prohibition on performing his duties as a Governor of the Central Bank of Latvia. This decision taken in February 2018 was to be of a temporary nature, but was not limited in time.

Mr Rimšēvičs decided to refer to the EU Court of Justice and challenge the lawfulness of the KNAB's decision. He claimed that he was effectively 'relieved from office' of the governor of a national central bank, which according to the relevant clause of Article 14.2. of the Statute would only be lawful if he was 'guilty of serious misconduct'. Mr Rimšēvičs' fellow members of the Governing Council of the ECB followed suit and decided, on behalf of the ECB, to bring an action before the Court of Justice, as well. Both Mr Rimšēvičs and the ECB relied on the second subparagraph of Article 14.2 of the Statute, a legal remedy which had never been activated before ("A decision to this effect [i.e., to relieve a Governor from office] may be referred to the Court of Justice by the Governor concerned or the Governing Council [of the ECB] on grounds of infringement of this Treaty or of any rule of law relating to its application.").

On the part of the defendant, the Republic of Latvia argued that the Court does not have jurisdiction to hear and determine the case. The Latvian Government contended that the contested decision does not to sever the legal and institutional links between the Central Bank of Latvia and its Governor and thus does not fall within the scope of Article 14.2. of the Statute.

2. Decision of the Court

The Court of Justice joint the Cases and handed down its judgment on 26 February 2019. The Court held that it does have jurisdiction under Article 14.2. and that the actions are well-founded. The Court was not convinced that there are sufficient indications that Mr Rimšēvičs has engaged in serious misconduct capable of justifying the contested measure. It observed that none of the documents produced by the Latvian Government in the course of the proceeding contains any evidence of the accusations of bribery, a finding that was shared by Advocate General Kokott in her Opinion. As a result, Mr Rimšēvičs was able to retake his seat at the table in Frankfurt.

3. Evaluation

The judgment does little to illuminate the obscure corruption scandal in the Latvian banking sector, which may or may not be a smear campaign against Mr

Rimšēvičs. The Latvian Government was very reluctant to produce meaningful documents from a file which it considers covered by the confidentiality of a criminal investigation. Only after the hearing made the Government a halfhearted offer to communicate further documents – too late according to the Court.

The Court of Justice applied a broad reading of its jurisdiction to review national acts that potentially undermine the independence of the ECB or the ESCB. In order to shield the ESCB from all political pressure, the scope of the review pursuant to Article 14.2. must not be limited to measures severing the legal link between the governor of the NCB and that bank. Consequentially, also a temporary prohibition on performing his or her duties falls within the jurisdiction of the Court of Justice. This seems to be a convincing approach, otherwise it would be easy to circumvent the guarantee of functional independence. The Court even went one step further by including measures taken in the course of criminal proceedings against the person concerned. Accordingly, the Court had to find a balanced approach to exercising its own jurisdiction in a way which does not interfere with the jurisdiction of national courts to rule on the criminal liability (para. 91–92). It conceded that a lawful measure taken by the competent authorities under the law of the Member State concerned could be a preliminary decision taken by a government agency, rather than a national court. However, in such instance the Court of Justice verifies that the measure was adopted on the basis of evidence establishing the existence of 'sufficient indications' that a serious misconduct has occurred, a reasonable standard which the Latvian authorities clearly failed to meet.

The spectacular element of the judgment concerns the form of court order. The Court of Justice held that a judgment rendered in an infringement proceeding under Article 14.2 of the Statute has cassatory effect, i.e. this provision vests the Court with the power to declare the contested act to be void. It classified an action pursuant to Article 14.2. as a special action for annulment (para. 66; cf. Article 264 TFEU, where this power is explicitly recognized). This classification is far from obvious. In fact, both claimants had sought the Court to 'declare' that the national measure is unlawful, i.e. to issue a form of order that has merely declaratory effect, similar to the judgment in an infringement proceeding pursuant to Articles 258 to 260 TFEU.

The Court of Justice did not fail to observe that the power of the EU judiciary to declare an act taken by a national authority to be void deviates from the general distribution of powers between national courts and the courts of the EU. This derogation can be explained, according to the Court, by 'the particular institutional context of the ESCB within which it operates'. It considers the ESCB 'a novel legal construct in EU law' which is less marked by the distinction between the EU legal order and national legal orders (para. 69). These reflections on the ESCB as a 'highly integrated system' and, in particular, the 'dual professional role' of the governor of a national central bank (para. 70) are supported by a teleological argument. In order to guarantee the functional independence of the members of the Governing Council of the ECB and the proper functioning of that body, the Court was not willing to accept the delay inherent in a declaratory judgment, which depends on its enforcement by the national authorities (para. 72–74).

These findings should send shockwaves through the circles participating in the discourse on European constitutional law. The Mephistophelian power of a court to nullify an act of public authority has always been regarded as the ultimate expression of its superior position. Suffice it to recall the power of constitutional courts to exercise judicial review of parliamentary legislation. Moreover, the Court of Justice itself has characterized the chance of a person to obtain a judgment whereby the contested measure is 'erased from the legal order' as the 'essence of judicial protection' (Cases C-584/10 P et al., *Commission, Council and United Kingdom v. Kadi*, para. 134). It marks the difference between the judicial system established by the EU Treaties as opposed to remedies usually available on the international plane. Such powers are always carefully circumscribed by the relevant constitution and, according to legal theory, are only available within the same legal order. Hence the cassatory effect of the

judgment pursuant to Article 263 TFEU and the declaratory effect of a judgment pursuant to Article 258 TFEU. Following the same logic, the Court of Justice has jealously defended its monopoly to declare an unlawful act of EU law to be void (Case 314/85, *Foto-Frost*), and has so far never assumed for itself that power vis-à-vis the Member States. This distribution of powers was not only seen as a general rule, from which exceptions may exist, but rather as an expression of an axiomatic assumption: the autonomy of the EU legal order.

Is this still true after the *Rimšēvičs* case? Two competing understandings of the state of constitutional affairs seem possible. One reading would stress the exceptionality of the ESCB and the limited scope of Article 14.2 of the Statute (though a number of elements mentioned by the Court of Justice are clearly not unique). From this perspective, the assumption that EU law and Member States' law form separate legal orders still stands. An alternative reading would search (and find) other incidents in recent case law which are difficult to reconcile with an orthodox doctrine of autonomy. One may point out, e.g., the *Taricco II* case (Case C-42/17, *M.A.S. and M.B.*) where the Court of Justice has arguably accepted certain limits to EU law's claim to primacy – limits which are derived from national constitutional law. From this point of view, the notion of autonomy is in decline, at least partially. Towards the outside world, i.e., Public International Law, it is as strong as ever (cf. Opinion 2/13 on the accession of the EU to the European Convention of Human Rights). Internally, the jurisprudence of the Court of Justice appears less driven by the aim of guarding mutually exclusive legal spaces, but increasingly by highlighting the common foundations and the cooperative elements of the European constitutional order.

The decision of the Court of Justice in the *Rimšēvičs* case has pushed the EU one step further along the federal path to fusing EU law and Members States law into a single legal order. Yet the Court of Justice should be careful what it wishes for. At some point in a not too distant future, a national court may cite *Rimšēvičs* as a precedent that in such a legal order neither side can hide behind a shield protecting its autonomy. If an EU court can declare a national act void, certainly a national court can do so vis-à-vis an EU act, as well? That national court will not fail to mention, just like the Court of Justice did, that such a legal remedy derogating from the general distribution of powers is 'very specific' and will be exercised in 'exceptional circumstances' only.

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